Before the
Federal Communications Commission
Washington, D.C. 20554

In tlie Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. **98-204**
Broadcast and Cable	)	
Equal Employment Opportunity	)	
Rules and Policies	)	

SECOND REPORT **AND** ORDER AND **THIRD NOTJCE** OF **PROPOSED RULE** MAKING

Comment Date: December **20,2002**
Reply Comment Date: January **6,2003**

Adopted: November **7,2002** Released: November **20,2002**

By the Commission: Chairman Powell. Commissioners Abernathy, Copps, and Martin issuing separate starements.

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I. INTRODUCTION

1. In this *Second Reporr and Order and Third Notice of Proposed Rule Making*, we adopt a new broadcast equal employment opportunity ("EEO") Rule in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, *rehearing den.* 253 F.3d 732 (D.C. Cir. 2001), *cert. denied,* 122 S.Ct. 920 (2002) ("*Association*"). In addition, we amend our EEO rules and policies applicable to cable operators. and other multichannel video programming distributors ("MVPDs"), to conform them. as much as possible. to the broadcast EEO Rule.[1] The new broadcast EEO Rule and modified EEO rules for MVPDs, adopted herein. emphasize outreach in recruitment to all qualified job candidates and ban discrimination on the basis of race. color. religion, national origin or gender. We are also issuing a *Third Notice of Proposed Rule Making* requesting comment as to the applicability of our rules with respect to part-time employees.

II. BACKGROUND

2. We have administered regulations governing the EEO responsibilities of broadcast licensees since 1969,[2] and of cable television operators since 1972.[3] Our responsibilities in this area were codified with respect to cable television operators in 1984.[4] They were further codified with respect to television broadcast licensees and extended to other MVPDs in 1992.[5] In 1998, however. the U.S. Court of Appeals for the District of Columbia Circuit held that the Commission's €EO program requirements for broadcasters were unconstitutional in *Lurheran Church-Missouri Synod v. FCC*.[6]

3 In *Lurheran Church,* the court focused on the Commission's "processing guidelines disclosing the criteria it used to select stations for in-depth EEO review when their licenses came up for

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[1] Our MVPD EEO rules. 41 C.F.R. § 76.71. *et seq.,* were implemented pursuant to Section 634 of the Cable Communications Policy Act of 1984. Pub. L. No. 98-549, 98 Stat. 2779 (1984), that applied to cable operators. and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385. 106 Stat. 1460 (1992), that extended the rules to other MVPDs. *See also* 47 C.F.R. §§ 21.920, 25.601, 74.996, 76.1702, 76.1802, and 100.51. Our rules define "multichannel video programming distributor" as "an entity such as. but not limited to. a cable operator. a multipoint distribution service. a multichannel multipoint distribution service ["MMDS']],a direct broadcast satellite service ["DBS"], a television receive-only satellite program distributor, and a video dialtone progam service provider..." 47 C.F.R.§ 76.71(a). For purposes of the EEO requirements, Congess defined the tern "cable operator" as including multichannel video programming distributors that control the programming they distribute. 47 U.S.C. § 554(h)(1); 47 C.F.R.§ 76.71(a). Given that our rules define MVPDs as including cable operators. for ease of reference we use the tern MVPDs throughout this *Second Reporr and Order* to include both cable operators and other MVPDs. We will not apply any EEO program requirements to low power FM stations because the vast majority of this class of licensees will employ few (if any) full time, paid employees.

[2] *See Nondiscrimination in Employment Practices*, 18 F.C.C.2d 240 (1969)

[3] *See Reporr and Order.* 34 F.C.C. 2d 186 (1972)

[4] *See Cable Communications Policy Act of 1984*, Pub. L. No. 98-549, 98 Stat. 2779 (1984)

[5] *See Cable Television Consumer Protection arid Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460. 1498 (1992).

[6] 141 F.3d 344 (D.C. Cir 1998), *pet for reh'g denied*, 154 F.3d 487, *pet for reh'g en banc denied*, 154 F.3d 494 (D C. 1998) ("*Lutheran Church*").

the claim that. because the new rule allegedly increased the regulatory burden imposed on stations. it was arbitrary and capricious. [24]

9. The court held, however. that Option B of the rule was subject to strict scrutiny because those broadcasters who elected Option B were required to report the race and sex of each job applicant. The court reasoned that this requirement would pressure broadcasters to focus their recruitment efforts on minorities and women because the FCC might investigate them if their recruitment efforts attracted few or no minorities or women. The court concluded that the EEO rule could not withstand strict scrutiny because. even if there were a compelling government interest in preventing discrimination – an issue the court did not resolve – the rule was not narrowly tailored to further that interest." Therefore. it held that Option B was unconstitutional under the equal protection component of the Due Process Clause of the Fifth Amendment.[26]

10. The court found no constitutional defect in recruitment Option **A** of the EEO rule. Since Option **A** did not require broadcasters to report the race or sex of job applicants or interviewees, and allowed them to select supplemental recruitment measures that do not "place special emphasis upon the presence of women and minorities in the target audience," it held that broadcasters were not "meaningfully pressured under Option **A** to recruit women and minorities."[27] Although the court found only Option B unconstitutional. it held that Option B could not be severed from tlie rest of the EEO rule. Accordingly. the court vacated the entire rule.

11. The Commission filed for hearing and rehearing ***en banc***, arguing that Option B was not essential to achieving its goal of ensuring that broadcasters engage in broad outreach in recruiting new employees and that it had made plain its intent that Option B be severable. The court denied rehearing.[28] However. it noted that the Commission ***was*** free, in a new rulemaking proceeding, to adopt other EEO measures that would "accommodate the concerns [the Commission] expressed about broadcasters' need for flexibility in general and about the burden Option A would impose upon broadcasters in small markets in particular" or to "change its goals.""

12. **We** issued the *Second Notice of Proposed Rulemaking ("Second NPRM")*[30] to request public comment on tlie adoption of new broadcast and MVPD EEO rules consistent with *Association*.

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[24] *Id.*

[25] *Id.* at *2* **1-22**

[26] *Id.* at 22

[27] *Id.* at 19.

[28] 253 F.3d 732.

[29] *Id.* at 736. **As** a result of the Court's decision, the Commission suspended the portions of its broadcast and MVPD EEO rules concerning EEO outreach program requirements and the reporting requirements until further order of the Commission. *Suspension of the Broadcast* and Cable Equal ***Employmenr*** *Outreach* ***Program*** *Requirements*, 16 FCC Rcd 2872 (2001). The rules prohibiting discrimination in broadcast and MVPD employment were not suspended

[30] 16 FCC Rcd 22843 (2001).

6. In addition to the basic requirement of wide dissemination of information concemingjob openings. the new rule provided broadcast licensees with two recruitment options. Under "Option **A."** they were required to undertake two types of supplemental recruitment measures. The first measure required licensees to provide notification of job vacancies to any recruitment organization that requested such notice from the broadcaster." The second supplemental measure under Option **A** required broadcasters to participate in additional recruitment activities beyond the traditional recruitment that occurs with individual vacancies. These additional measures were to be selected from an open-ended menu of types of activities that included: job fairs, job banks, scholarship programs. and community events related to employment opportunities in the industry. among others." Broadcasters were permitted to comply with the supplemental requirement by participating in activities other than the listed ones so long as they uere designed to disseminate information about employment opportunities to candidates who might othenvise not learn of them.[18] Broadcasters who selected Option **A** were required to maintain. hut not routinely submit to the Commission, records documenting their compliance with the wide dissemination and supplemental recruitment requirements. They were not required to maintain any data on the race. ethnicity or gender of applicants, interviewees or individuals they hired."

7. In response to commenters who urged the Commission to provide greater recruiting flexibility. the Commission adopted an "Option B" for recruitment that permitted licensees to forego the supplemenral recruitment measures required under Option **A** "and to design their own outreach program to suit their needs, as long as they can demonstrate that their program is inclusive, *i.e.*, that it widely disseminates job vacancies throughout the local community."" **A** broadcaster who chose this option and designed its own recruitment program was required to track the recruitment sources, gender. and race/ethnicity of its applicant pools so that the broadcaster, the public and the Cornmission could evaluate the effectiveness of the program."" The Commission emphasized that "there is no requirement that the composition of applicant pools be proportionate to the composition of the local work force," hut that "few or no females or minorities in a broadcaster's applicant pools may be one indication (and only one indication) that the station's outreach efforts are not reaching the entire community.""

8. In *Association*, the court rejected statutory challenges to the new EEO rule and held that the rule was not arbitrary and capricious. It found, first, that the contention that the rule relied on the goal of promoting programming diversity – the legitimacy of which had been questioned in *Lutheran Church* – **was** "beside the point" because the Commission had made clear "that its primary and assertedly sufficient goal in issuing the EEO rule was to prevent invidious discrimination."" It found nothing arbitrary or capricious in the Commission's pursuit of that goal. Second, the court found unsupported

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16 *Report and* ***Order.*** ¶¶ 95-98. 15 FCC Rcd at 2371-72

17 *Report and Order*, ¶¶ 99-103, 15 FCC Rcd at 2372-74

18 *Report ond Order* ¶ 102, 15 FCC Rcd at **2373**

19 *Report and Order*, ¶ 111-13. 116-18, 15 FCC Rcd at 2376-78.

20 *Report and Order*, ¶ 104, 15 FCC Rcd at 2374

21 *Id.*

22 *Report and Order*, ¶ 120. 15 FCC Rcd at 2378.

23 236 F 3d at 18

interviewed for full-time vacancies during the preceding year and the total number of interviewees referred by each recruitment source: and (v) a list and brief description of Prong 3 menu options implemented during the preceding year.

(c) submit the station's EEO public file report to the Commission as part of the renewal application and midway through the license term for the Commission's mid-tern review for those stations subject to mid-term review (television stations with five or more full-time employees and radio stations with more than ten full-time employees). EEO public file reports for tlie preceding two year period will be required because broadcasters have **two** years in which to complete the prong 3 menu options. Broadcasters must also post the current EEO public tile report on their web site. if they have one.

15. The same requirements will apply to MVPDs, except as necessary to comply with different statutory requirements. For example, Section 634 of the Communications Act of 1934. as amended ("Communications Act")" requires that MVPDs file reports on an annual basis containing information specified in the statute. The Commission is also required to certify that MVPD employment units are in compliance with the EEO requirements on an annual basis." Accordingly, to comply with the Prong 3 requirements. MVPD employment units with six to ten full-time employees and employment units located in smaller markets will be required to undertake one recruitment initiative each year and larger employment units located in larger markets two recruitment initiatives per year. MVPD employment units are not subject to a renewal process at the Commission. Pursuant to Section 634((e)(2) of the Communications Act, however, the Commission is required to conduct a more thorough review of each cable employment unit's EEO compliance every five years. Hence, MVPDs with six or more full-time employees will submit a copy of their most recent EEO public inspection file report to tlie Commission ever); five years.

16. The Commission has implemented the MVPD annual reporting requirement under Section 634 by FCC Forms 395-A (cable operators) and 395-M (other MVPDs). We will create a new Form 396-C for all MVPDs that will encompass the same information concerning the unit's EEO outreach efforts that was formerly required in FCC Forms 395-A and 395-M. The prior forms were also used to collect data concerning the race/ethnicity and gender of the unit's workforce. The form we are adopting today will not encompass such data because. as indicated below, we will defer action on the collection of workforce data.

17. We are not acting at this time on issues raised in the *Second NPRM* concerning the broadcast annual employment report (FCC Form 395-B), which has in the past been used to collect data concerning tlie workforces of broadcast employment units. including data concerning the raceiethnicity and gender of those workforces. We are similarly not acting on a comparable form for MVPDs. The Office of Management and Budget ("OMB") adopted new standards for classifying data on race and ethnicity in 1997 that must be incorporated in any such forms beginning in 2003." We must incorporate

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[32] *41* U.S.C. § 554.

[33] *See* Section 634(e)(1) of the Communications Act.

[34] *Revisions to rhe Standards for the Classification of Federal Data on Race und Ethnicity*, *63* Fed. Rep. 58782 (1997).

An *En Banc* open hearing on the proposed rules was held before the full Commission on June 24. 2002. Having reviewed the suggestions contained in the comments submitted:' both in writing and at the *En Banc* hearing, we are adopting new EEO rules that consist primarily of the elements of our former rules that the Court upheld as constitutional in *Association*, with modifications.

III. SUMMARY

13. In this order, we adopt new outreach requirements applicable to broadcast and **MVPDs.** We are also retaining the nondiscrimination rules applicable to broadcasters and MVPDs.

14. The following is a summary of the three-pronged outreach requirement we are adopting as it relates to broadcasters:

Prong 1: uidely disseminate information concerning each full-time (30 hours or more) job vacancy, except for vacancies filled in exigent circumstances:

Prong 2: provide notice of each full-time job vacancy to recruitment organizations that have requested such notice; and

Prong:: complete two (for broadcast employment units with five to ten full-time employees or that are located in smaller markets) or four (for employment units with more than ten full-time employees located in larger markets) longer-term recruitment initiatives within a two-year period.

'The following is a summary of recordkeeping and reporting requirements:

(a) collect. but not routinely submit to the Commission: (i) listings of all full-time joh vacancies filled by the station employment unit, identified by job title. (ii) for each such vacancy, the recruitment sources used to fill the vacancy (including. if applicable, organizations entitled to notification, which should be separately identified), identified by name, address, contact person and telephone number; (iii) dated copies of all advertisements, bulletins. letters. faxes, e-mails, or other communications announcing vacancies: and (iv) documentation necessary to demonstrate performance of the Prong 3 menu options. *e.g.*, job fairs, mentoring programs: (v) the total number of interviewees for each vacancy and the referral source tor each interviewee: and (vi) the date each job was tilled and the recruitment source that referred the hiree.

(b) place in the station public file annually a report including the following: (i) a list of all full-time vacancies tilled during the preceding year. identified by joh title: (ii) recruitment source(s) used to fill those vacancies (including organizations entitled to notification of vacancies pursuant to Prong 2). including the address. contact person. and telephone number of each source; (iii) a list of tlie recruitment sources that referred the people hired for each full-time vacancy: (iv) data reflecting the total number of persons

[31] Some comments were submined after the April **15,** 2002, deadline. We are accepting all of those comments in order to have the fullest possible record to inform our decision.

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these new standards in our future forms." In addition, a party has raised issues concerning the collection and processing of the forms.[36] Because the employment reports are tiled on September 30 of each year. the next reports would not be due earlier than September 30, 2003. We expect the forms to be completed by this deadline. Accordingly. there is no urgency in resolving issues relating to the data collection Conversely. there is no need to delay adopting new EEO rules. The data collected in the employment reports will be used only to compile trend reports and report to Congress." It will not be used to determine compliance with the EEO rules that we adopt today." Accordingly, we will defer action on issues relating to the broadcast and MVPD workforce data collection requirements and address them in a future report and order.

IV. DISCUSSION

A. Statutory Authority for EEO Program Requirements and Anti-Discrimination Rules

1. EEO Rules Applicable to Multichannel Video Programming Distributors

18. The Commission is explicitly authorized by Section 634 of the Communications Act to adopt and enforce the MVPD EEO rules.[39] Indeed, Section 634 requires us to enforce EEO rules for MVPDs. The court did not address the validity of our MVPD EEO rules in either the *Lutheran Church* or *Association* decisions. Nevertheless, because certain provisions in the MVPD EEO rules are similar to those provisions in the broadcast EEO Rule found to be unconstitutional in *Associalion,* we are revising our MVPD EEO rules so that they comply with the court's decision.

19. Although the Commission is required by Section 634 to enforce EEO Rules for the MVPD industry, Congress built into Section 634 flexibility by allowing the Commission to implement MVPD EEO rules by rulemaking rather than simply prescribing MVPD EEO requirements by statute; by stating in Section 634(d)(2) that the "rules shall specify the terms under which" an entity shall take the actions specified in that section;'" and by providing in Section 634(d)(4) that the Commission may amend the MVPD EEO rules "from time to time to the extent necessary to carry out the provisions of this section." Our rulemaking authority, particularly under Sections 634(d)(2) and 634(d)(4), permits us to adopt new, race-neutral outreach requirements and to revise the FCC Forms filed by MVPDs to make them consistent with our modified broadcast EEO rules. None of the commenting parties disputes that Section 634 explicitly authorizes the Commission to adopt and modify our MVPD EEO regulations to

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[35] 3060-0390 OMB Notice of Action dated February 24. 2000 from OMB to FCC.

[36] *See ex parte* letter dared October 28, 2002, from StBAs to FCC ("If the Cornmission believes...that it must conduct annual surveys of industry employment trends, it must do so by having a reputable, third party act as a clearing house for the aggregation of such data on an anonymous, non-attributable basis.").

[37] ***Second** NPRM.* ¶ 50, 16 FCC Rcd at 22858

[38] We thus find no merit in StBAs' argument that resolution of [the 395-B] issues is "inextricably iniertwined" with the issues addressed in this *Second Report and* ***Order.*** *See* ***ex*** *parte* letter dated October 28, 2002. from StBAs to FCC.

[39] 47 U.S.C. § 554

[40] In contrast. Section 634(c) simply provides that MVPDs "shall" comply with five listed requirements in implementing their EEO programs.

renewal." The court concluded that because. "[n]o rational firm – particularly one holding a government-issued license – welcomes a government audit," the processing guideline "induces an employer to hire with an eye toward meeting the numerical target."[8] The Coun thus concluded that the CEO program requirements were unconstitutional because they "pressure – even if they do not explicitly direct or require – stations to make race-based hiring decisions."' The Court made clear that "[i]f the regulations merely required stations to implement racially neutral recruiting and hiring pro,grams. the equal protection guarantee would not be implicated.""' And it reiterated in response to the government's rehearing petition that it had not held that a regulation "encouraging broad outreach to, as opposed to the actual hiring of. a particular race would necessarily trigger strict scrutiny.""

4 In 1998. we issued a *Notice of Proposed Rule Making''* for the purpose of adopting EEO rules for broadcast licensees and MVPDs consistent with the Court's decision in *Lutheran Church.* In 2000, we adopted new EEO program requirements for broadcasters." Substantially the same program requirements were applied to MVPDs. The Commission explained that the new rules required more "than merely refraining from discrimination.'' They also required broadcasters and MVPDs "to reach out in recruiting new employees beyond the confines of their circle *of* business and social contacts to all sectors of their communities [because] ... repeated hiring without broad outreach may unfairly exclude minority and women job candidates ...." The Commission concluded that nondiscrimination in hiring was not enough when not all potential applicants have had a fair opportunity to apply. "Outreach in recruitment must he coupled with a ban on discrimination to effectively deter discrimination and ensure that a homopenous workforce does not simply replicate itself through an insular recruitment and hiring process.""

5. The new rule contained two primary requirements – a prohibition on discrimination based on race. color. religion. national origin or gender in hiring, and a requirement that broadcasters reach out in recruiting new employees to ensure that all qualified individuals had an opportunity to apply for and be considered as job candidates. The core of the recruitment requirement was that broadcasters widely disseminate information concerning all job vacancies. The Commission concluded that this basic requirement "is essential to meaningful outreach."" The Commission left it largely to broadcasters' discretion concerning lhow they would fulfill this requirement. so long as their procedures were sufficient to ensure wide dissemination of information about all job openings to the entire community.

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141 F.3d at 352

[8] 141 F 3d at 353.354

[9] 154 F 3d at 491.

[10] 141 F.3d at 351

[11] 154 F 3d at 492

[12] 13 FCC Rcd 23004 (1998) (*1998 NPRM*)

[13] 15 FCC Hcd 2329 (2000) ("*Report and Order*"), *recon. denied.* 15 *FCC* Rcd 22548 (2000) *("Recon")*

[14] *Report and Order.* ¶ 3, 15 FCC Rcd at 2331

[15] *Report and Order.* ¶ 85. 15 FCC Rcd at 2368.

EEO practices of television broadcasters. Section 334 was enacted as part of Section 22 of the 1992 Cable Act. which sets forth Congressional findings that, despite existing FCC EEO rules. there were few women and minorities in managerial positions in the MVPD and broadcast industries: that increased employment of women and minorities in managerial positions will advance the national policy favoring diversity of viewpoints in the electronic media; and that rigorous enforcement of EEO rules is required to effectively deter racial and gender discrimination."

24. LTVG and Golden Orange argue that because Section 334 is written in negative terms, it does not authorize the Commission to adopt new outreach rules that are quite different from the 1992 EEO rules which the court invalidated in the Lutheran Church decision." Further. these commenters argue thar Section 334 prohibits the Commission from adopting new outreach rules because those rules represent substantive "revisions" of the 1992 rules." Golden Orange asserts that Section 334 is still in effect because the court did not hold that statutory provision unconstitutional and that the Commission cannot disregard it.

25. We agree that Section 334 of the Act was not invalidated by the court in either the ***Lutheran Church*** or *Association* cases, and thus remains in effect. We disagree, however. on the current effect of that statutory provision. Section 334 prohibited the Commission from revising the 1992 EEO rules and the Commission did not do so. The ***court invalidated*** the EEO program requirements in effect in 1992 on constitutional grounds. To the extent that the court held the 1992 EEO rules unconstitutional and invalidated those rules in ***Lutheran Church,*** those rules are no longer in effect and the Commission cannot enforce them against television broadcasters notwithstanding Section 334. Section 334 does ***not*** prohibit the Commission, however, from adopting ***new*** rules to fill the void left by the court's decision.

76. Golden Orange asserts that the Commission is "not free to pick and choose those portions of the Act which it will obey."[48] Although this is of course true, the Commission is not choosing lo obey only selected portions of the Act. After the ***Lutheran Church*** decision, the Commission is required by Section 334 to enforce against television broadcasters only those portions of the 1992 EEO rules that the court did not invalidate. The court held that "the Commission's EEO program requirements are unconstitutional" and invalidated those rules,[49] but did not invalidate the nondiscrimination requirement in Section 73.2080(a) of the rules."[50] Rather, it remanded the case to the Commission to

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carry hroadcast stations. it simply codified the FCC's existing EEO rules for all television broadcasters by providing that the Commission "shall not revise" them. By including this provision in the 1992 Cable Act. which gave television broadcasters carriage rights on cable systems. Congress appeared to be trying to ensure that broadcast television stations and cable television operators were subject to comparable EEO requirements.

[45] 1992 Cable Act. Section 22(a). These findings are quoted in Section b. ***infra.***

[46] LTVG Comments at 28-29; Golden Orange Comments at 24-27

[47] LTVG Comments at 28-29: Golden Orange Comments at 18-24

[48] Golden Orange Comments at 26-27.

[49] *Lutheran* ***Church,*** 141 F.3d at 356. If Golden Orange is suggesting that the D.C. Circuit invalidated only certain portions of the 1992 EEO program requirements and left others in effect – i.e., severing the unconstitutional portions - that position is untenable. The ***Lutheran Church*** decision states simply that the court held the "EEO program requirements.' unconstitutional. and nowhere suggests that any portion of those requirements were severed and left in effecr.

[50] ***Lurheran Church.*** 141 F.3d at 356

the claim that. because the new rule allegedly increased the regulatory burden imposed on stations. it was arbitrary and capricious. [24]

9. The court held. however. that Option **B** of the rule was subject to strict scrutiny because those broadcasters who elected Option B were required to report the race and sex of each job applicant. The court reasoned that this requirement would pressure broadcasters to focus their recruitment efforts on minorities and women because the FCC might investigate them if their recruitment efforts attracted few or no minorities or women. The court concluded that the EEO rule could not withstand strict scrutiny because. even if there were a compelling government interest in preventing discrimination – an issue the court did not resolve – the rule was not narrowly tailored to further that interest." Therefore. it held that Option B was unconstitutional under the equal protection component of the Due Process Clause of the Fifth Amendment.[26]

10. The court found no constitutional defect in recruitment Option **A** of tlie EEO rule. Since Option A did not require broadcasters to report the race or sex of job applicants or interviewees. and allowed them to select supplemental recruitment measures that do not "place special emphasis upon the presence of women and minorities in the target audience," it held that broadcasters were not "meaningfully pressured under Option **A** to recruit women and minorities."" Although the court found only Option B unconstitutional. it held that Option B could not be severed from the rest of the EEO rule. Accordingly. the court vacated the entire rule.

11. The Commission filed for hearing and rehearing ***en banc***, arguing that Option B was not essential to achieving its goal of ensuring that broadcasters engage in broad outreach in recruiting new employees and that it had made plain its intent that Option B be severable. The court denied rehearing.[28] However, it noted that the Commission was free. in a new rulemaking proceeding, to adopt other EEO measures that would "accommodate the concerns [the Commission] expressed about broadcasters' need for flexibility in general and about the burden Option A would impose upon broadcasters in small markets in particular" or to "change its goals.""[29]

12. We issued the ***Second*** *Notice of* ***Proposed*** *Rulemaking ("Second NPRM")*[30] to request public comment on the adoption of new broadcast and MVPD EEO rules consistent with *Association.*

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[24] *Id*

[25] *Id.* at 21-22.

[26] *Id.* at 22.

[27] *Id.* at 19.

[28] 253 F.3d 732.

[29] *Id* **at** 736 **As** a result of the Court's decision, the Commission suspended the portions of its broadcast and MVPD EEO rules concerning EEO outreach program requirements and the reporting requirements until further order of the Commission. *Suspension of the Eroadcasi and Cable Equal Employment Outreach Program Requirements*, 16 FCC Rcd 2872 (2001). The rules prohibiting discrimination in broadcast and MVPD employment were not suspended

[30] 16 FCC Rcd **22843** (200 I)

with a station's obligation to operate in the public interest. and relied on Sections 4(i), 303, 307, 308. 309 and 310 in adopting the new rules. Relying on its authority to license and regulate broadcasters in the public interest, the Commission has revised and extended its rules on numerous occasions since 1969 to. *inter alia*, refine its EEO program requirements. require licensees to file infomation concerning these programs and other statistical employment information with the Commission, and prohibit discrimination against. and require outreach to, women."

29. Over the last 30 years. the Commission has vigorously enforced its EEO requirements. sanctioning broadcast licensees in numerous cases for failing to comply fully with those requirements. Commission decisions enforcing the EEO requirements have been challenged both by licensees who have been sanctioned for noncompliance[58] and by petitioners who believed that Commission enforcement was not vigorous enough." Indeed, the Court *of* Appeals for the D.C. Circuit held more than 20 years ago that the Commission ***must*** investigate broadcasters' employment practices and, in assessing the character qualifications of broadcast licensees, consider whether they have engaged in intentional employment discrimination.[60] And the Supreme Coun observed in the seminal case addressing the scope of an agency's authority to serve the "public interest" that FCC regulation of the employment practices *of* its licensees "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."[61]

30. As discussed below, during the three decades that the Cornmission has administered EEO program requirements and nondiscrimination rules, Congress has repeatedly expressed awareness of the rules and has not only acquiesced in them, but has also referred to them approvingly, confirming our view that the Commission has statutory authority to promulgate these rules. Thus. Congress has ratified the Commission's authority to adopt and enforce EEO requirements against broadcasters under its statutory mandate to license and regulate broadcasters in the public interest.

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[57] *See, e.g., Petition for Rulemaking to* **Require** *Broadcast Licensees to* **Show** *Nondiscrimination in Their Employment Practices*, 23 F.C.C. 2d 430 (1970); *Amendmenr of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 340, and 342, and Adding* **rhe Equal** *Employment Program Filing Requirement to Commission Rules 73.125, 73.301, 73.599 '3 680, and '3 793*. 32 F.C.C. 2d 708 (1971); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C. 2d 226 (1976) ("1976 *Report and Order") See also Memorandum of Understanding Between the Federal Communications Commission ond the Equal Employment Opportunity Commission*, 70 F.C.C.2d 2320 (1978) (delineating the Commission's investigative jurisdiction and methods of cooperation with the Equal Employment Opportunity Cornmission ("EEOC")).

[58] *See, e.g., San Luis Obispo Broadcasting Ltd. Partnership*, 13 FCC Rcd 1020 (1998); *Valley Television, Inc.*, 12 FCC Rcd 22795 (1998); *Congaree Broadcasting, Inc.*, 5 FCC Rcd 7691 (1990); *South Plains Broadcasting Company, Inc .* 101 F.C.C. 2d 1364 (1985).

[59] *See, e.g., Davidson County Broadcasting Company, Inc.*, 12 FCC Rcd 12245 (1997); *Broadcast Associates, Inc.*, 11 FCC Rcd 15479 (1996); *Buckley Broadcasting Corp.*, 11 FCC Rcd 6628 (1996); *Lanser Broadcasting Corp.*, 10 FCC Rcd 12121 (1995); *Ogden Broadcasting of South Carolina, Inc.*, 7 FCC Rcd 1895 (1992).

[60] *Bilingual*, 595 F.2d at 628-29 ("[I]n implementing its anti-discrimination policy. the Commission of necessity must investigate broadcasters' past employment practices. A documented pattern of intentional discrimination would put seriously into question a licensee's character qualification to remain a licensee: intentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship.").

[61] *NAACP v. FPC*, 425 U.S. 662, 670 **n.7** (1976).

interviewed for full-time vacancies during the preceding year and the total number of interviewees referred by each recruitment source; and (v) a list and brief description of Prong 3 menu options implemented during the preceding year.

(c) submit the station's EEO public file report to the Commission as part of tlie renewal application and midway through the license term for the Commission's mid-term review for those stations subject to mid-term review (television stations with five or more full-time employees and radio stations with more than ten full-time employees). EEO public file reports for the preceding two year period will be required because broadcasters have two years in which to complete the prong 3 menu options. Broadcasters must also post the current EEO public tile report on their web site, if they have one.

15. The same requirements will apply to MVPDs, except as necessary *to* comply with different statutory requirements. For example, Section 634 of the Communications Act of 1934. as amended ("Communications Act")" requires that MVPDs file reports on an annual basis containing information specified in the statute. The Commission is also required to certify that MVPD employment units are in compliance with the EEO requirements on an annual basis.[33] Accordingly, *to* comply with the Prong 3 requirements, MVPD employment units with six to ten full-time employees and employment units located in smaller markets will be required ***to*** undertake one recruitment initiative each year and larger employment units located in larger markets two recruitment initiatives per year. MVPD employment units are not subject to a renewal process at the Commission. Pursuant to Section 634((e)(2) of the Communications **Act.** however, the Commission is required to conduct a more thorough review of each cable employment unit's EEO compliance every five years. Hence, MVPDs with six or more full-time employees will submit a copy of their most recent EEO public inspection file report to the Commission every five years.

16. The Commission has implemented the MVPD annual reporting requirement under Section 634 by FCC Forms 395-A (cable operators) and 395-M (other MVPDs). We will create a new Form 396-C for all MVPDs that will encompass the same information concerning the unit's EEO outreach efforts that was formerly required in FCC Forms 395-A and 395-M. The prior forms were also used to collect data concerning the raceiethnicity and gender of the unit's workforce. The form we are adopting today will not encompass such data because. as indicated below, we will defer action on the collection of workforce data.

17. We are ***not*** acting at this time on issues raised in tlie *Second NPRM* concerning tlie broadcast annual employment report (FCC Form 395-B), which has in the past been used to collect data concerning the workforces of broadcast employment units. including data concerning the raceiethnicity and gender of those workforces. We are similarly not acting on a comparable form for MVPDs. The Office of Management and Budget ("OMB") adopted new standards for classifying data on race and ethnicity in 1997 that must be incorporated in any such forms beginning in 2003.[34] We must incorporate

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[32] 47 U.S.C. § 554.

[33] *See* Section 634(e)(1) of the communications **Act.**

[34] *Revisions io the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. **58782** (1997).

continuing program of specific practices designed to ensure equal opportunity in every aspect of its employment policies and practices ...."[67]

34. The legislative history of Section 634 makes it unmistakably clear that Congress believed that the Commission already possessed authority to regulate the EEO practices of mass media entities -- broadcast as well as cable. The House Commerce Committee Report on the bill proposing the provisions on which Section 634 was based explicitly confirmed the Commission's authority to adopt EEO rules. The House Commerce Committee stated:

> *It is well established that the Commission has the authority to regulate employment practices in the communications industry.* Among the Commission's efforts in the equal employment opportunity (EEO) area over the last several years has been the enforcement of employment standards in the cable industry. Section 634 endorses and extends those standards.
>
> Because of the potentially large impact cable programming and other services provided by tlie cable industry has on the public. the employment practices of the industry have an importance greater than that suggested by the number of its employees. The committee strongly believes that *equal employment requirements are particularly important in the mass media area* where employment is a critical means of assuring that program service will be responsive to a public consisting of a diverse array of population groups.[68]

35. In addition to the explicit recognition of the Commission's broad and "well established" authority to regulate employment practices in the communications industry, the legislative history of Section 634 shows that Congress viewed the legislation as codifying. strengthening and building upon the Commission's pre-existing regulatory scheme. which it viewed as well within the Commission's statutory authorit?. For example. the House Report states that the legislation "codifies and strengthens the Commission's existing equal employment opportunity regulations."" Further. it states that tlie statutory definition of the entities that are subject to the EEO requirements "endorses the Commission's current practice of reviewing compliance with EEO standards by cable systems and other employment units with more than 5 employees. and extends the applicability of EEO requirements to headquarters operations."'" Similarly. it states that the provisions specifying the requirements for Commission EEO rules "conform in large part to the Commission's required EEO program under existing regulations.'"'

36. Additional evidence of congressional ratification can be found in the Cable Television Consumer Protection and Competition Act of 1992,[72] which further strengthened the cable EEO requirements. extended those requirements to all MVPDs, and codified the Commission's EEO program and nondiscrimination requirements as applied to broadcast television licensees. Moreover, Congress once again explicitly acknowledged the existence of the Commission's broadcast and cable EEO

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67 47 U.S C. § 554(b), *(c),* (d).

68 H.R. Rep. No. 934, 98th **Cong.,** 2d Sess. **84-85** (1984) (emphasis added).

69 *Id.* at **86.**

70 *hi.*

71 *Id.* at *87.*

72 Pub L. No. 192-385, 106 Stat. **1460.**

advance congressional goals identified in the statute, and two parties filed comments agreeing that we have such statutory authority[41]

20. Additionally, Section 634(d)(2) obligates the Commission to implement the listed requirements only "to the extent possible," consistent with other conflicting requirements or limitations. The court's decision in *Associalion* delineates constitutional limitations with which we must reconcile the MVPD EEO rules. We believe that Section 634(d)(2) permits the Commission to eliminate those provisions of the MVPD EEO rules that are similar to those struck down by the court in *Association* because it is not "possible" for the Cornmission to enforce a provision that a court has found unconstitutional. Accordingly, we modify the MVPD EEO rules in this ***Second Reporr*** *ond* ***Order*** *ond Third Notice* ***of*** *Proposed* ***Rule*** *Making* to remove provisions similar to those found unconstitutional in *Associaiion*. We also revise the forms filed by MVPDs to conform them with our modified rules.

2. EEO Rules Applicable to Broadcasters

21. The Commission has ample statutory authority to retain its EEO anti-discrimination rule and, consistent with the constitutional standards established in *Lutheran* ***Church*** and *Associalion.* to promulgate new EEO outreach requirements for broadcasters. Congress explicitly authorized the Commission in 1992 to regulate the EEO practices of television broadcasters and lias ratified the Commission's authority to adopt EEO rules for all broadcasters.

a. Section 334: Explicit Authority to Regulate EEO Practices of Television Broadcasters

22. In 1992. Congress enacted Section 334 of the Communications Act as part of the Cable Television Consumer Protection and Competition Act of 1992.[42] Section 334 provides that "the Commission shall not revise:"

> (1) the regulations concerning equal employment opportunity as in effect on September I. 1992 (47 C.F.R. 73.2080) as such regulations apply to relevision broadcast station licensees and permittees: or
>
> (2) the forms used by such licensees and permittees to report pertinent employment data to the Commission."

23. The Conference Report accompanying this legislation indicates that Section 334 "codifies the Commission's equal employment opportunity rules, 47 C.F.R. 73.2080" for television licensees and permittees.[44] Section 334 thus grants the Commission explicit authority to regulate the

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[41] NOW Reply Comments at 7; American Cable Association Reply Comments at 5

[42] Pub L No. 192-385, 106 Stat. 1460 ("1992 Cable Act")

[43] 47 U.S C. § 334(a)

[44] Conf. Rep. No. 862, 102d Cong.. 2d Sess. 97 (1992). The Senate bill, S.12, contained no EEO provisions. Secrion 334. as adopted by the conference committee. was derived from the House amendment of S.12, which contained(1) provisions strengtheningthe cable EEO requirements and **(2)** provisions (modeled after Section 634 of the Communications **Act)** that codified and strengthened the Commission's existing broadcast EEO rules as applied to broadcast television stations entitled to cable carriage under the 1992 Cable Act. The conference committee adopted the House provisions applicable to cable entities. But instead of adopting the House provisions for must-

39. It is within this historical context that the Commission's statutory authority to regulate the EEO practices of broadcast licensees must be viewed. As discussed above. the Supreme Coun has inferred congressional ratification of administrative action from "nothing more than silence in the lace of an administrative policy."" Here. the inference of congressional ratification rests on far firmer ground. including explicit statements confirming the Commission's authority to regulate the EEO practices of media companies, legislation that codified and expanded the reach of Commission EEO regulations. and a directive to the Commission to review the effectiveness of its EEO regulations and report back to Congress on how they are working and how they could be improved.[80] Under these circumstances. the inference of congressional ratificarion is inescapable.[81]

40. There is another compelling reason to find in the current statutory context that Congress has ratified our authority to regulate the EEO practices of broadcasters. The Supreme Court has held on numerous occasions that courts should interpret a statute "'as a symmetrical and coherent regulator) scheme' and 'fit, if possible, all parts into an harmonious whole.'"[82] In interpreting statutes granting administrative or ,judicial ,jurisdiction. the Supreme Court has held specifically that any interpretation of congressional intent that will result in a "bizarre jurisdictional patchwork" is to be disfavored absent legislative history or a persuasive functional argument to tlie contrary.[83] In this case. Congress has *explicitly* granted the Commission authority to regulate the EEO practices of television broadcasters.

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[79] *Haig,* 453 U.S. at 300. *citing Zemel.* 381 U.S. at 11 and other Supreme Court cases

[80] The facts here give rise to an even stronger inference of congressional ratification than was present in *City of New York v. FCC.* 486 U.S. 57 (1988), for example. In that case. cable television franchisors challenged the Commission., authority. in adopting regulations establishing cable signal quality technical standards. to forbid state and local authorities to impose more stringent technical standards. In determining that the Commission acted within its statutory authorirq in preempting state and local standards. the Supreme Coun found that Congress in the Cable Act of 1984 endorsed the Commission's longstanding policy of federal preemption of cable technical standards. and that it was "quite significant" that there was no evidence of any intent by Congress to "overturn the Commission's decade-old policy without any discussion or even any suggestion that it was doing so.'' *Id.* at 67-68. In the case of the Commission's jurisdiction to regulate in the EEO area, there is affirmative evidence of congressional approval of tlie Commission's statutory authorirq.

[81] *See, e.g., City of New York v FCC, supra; Bob Jones University,* 461 U.S. at 601 (finding that "Congress affirmatively manifested its acquiescence" in the IRS' statutory interpretation that educational institutions that discriminate on the basis of race are not eligible for an income tax exemption when it enacted a new provision denying tax-exempt status to social clubs that discriminate on the basis of race); *U.S v Rutherford,* 442 U.S. 544, 554 n.10 (1979) ("once an agency's statuto? construction has been fully brought to the attention of the public and the Congress and the latter has nor sought to alter that interpretation although it has amended the statute in other respects. then presumably the legislative intent has been correctly discerned"). *quoting Apex Hosiery Co. v Leader,* 310 U.S. 469, 487-89 (1940); *Lorillard,* 434 U.S. at 580 (where Congress adopted a new law incorporating sections of a prior law, it can he presumed to lhave had knowledge of and approved the interpretation given to the prior law). *Zemel.* 381 U.S. at 12 (Congress ratified Secretary of State's authority to refuse to impose area restrictions on travel when "[d]espite 26 vears of executive interpretation of the 1926 Act as authorizing the imposition of area restrictions. Congress in 1952, though it once again enacted legislation relating to passports. left completely untouched the broad rule-making authority granted in the earlier Act.").

[82] *Food ond Drug Administration v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000) (citations omitted from quotation). *quoting Gustafson v. v Alloyd Co.,* 513 U.S. 561, 569 (1995) and *FTC v. Mandel Brothers, Inc.,* 359 U.S. 385. 389 (1959).

[83] *Lindahl v. Office of Personnel Management,* 470 U.S. 768, 799 (1985); *Crown Simpson Pulp Co v. Costle,* 445 U.S. 193, 197 (1980).

determine whether it had authority to promulgate the nondiscrimination requirement." Thus. after the *Lutheran Church* decision. we believe that we are required by Section 334 to enforce Section 73.2080(a) against television broadcasters as that provision was in effect in 1992, but not the 1992 EEO program requirements. which are a nullity

27. Although the proscriptive effect of Section 334 narrowed following the court's invalidation of the 1992 EEO program requirements. that provision still remains significant as an expression of Congressional intent. LTVG misses the point when it asserts that Section 334 provides no authority tor the Coinmission to adopt new outreach requirements." Section 334 cannot he read in isolation Rather, the Commission must interpret it as one component of a "symmetrical and coherent regulator! scheme" and "fit. if possible, all pans into an harmonious whole."[53] As discussed in detail below. Section 334 is but one element in a series of Congressional enactments and stateinents that made it clear that the Commission's broad authority under Title III of the Act to regulate broadcasters in tlie public interest embraced the authority to regulate their EEO practices. Reading the entire statute and legislative history against the backdrop of the Commission's history of regulating the EEO practices of broadcasters and other media entities leaves no doubt that the Commission has authority to adopt new rules requiring outreach in recruitment by broadcasters – both television and radio broadcasters – as well as MVPDs. It would be perverse indeed to interpret a statutory provision intended by Congress to ensure that all broadcast and multichannel video program providers are subject to comparable EEO requirements in a way that would shield television broadcasters from EEO regulation and thus defeat the purpose of the statute. We therefore reject the wooden and noncontextual interpretation advocated by LTVG and Golden Orange."

b. Congressional Ratification

28. The Commission has maintained nondiscrimination and EEO program requirements for broadcasters for more than 30 years. In **1968.** the Commission concluded that the national policy against discrimination and the fact that broadcasters are licensed under the Communications Act to operate in tlie public interest required the Commission to consider allegations of employment discrimination in licensing hroadcast stations.[54] In 1969, the Commission adopted rules prohibiting broadcast stations trom discriminating against any person in employment on the basis of race, color, religion. or national origin. and requiring stations to maintain a program designed to ensure equal opportunity in every aspect *of* station employment.[55] It reiterated its view that discriminatory employment practices are incompatible

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[51] *Id.*

[52] LTVG Comments at *29*

[53] *Food and Drug Administration* v. **Brown** & *Williamson Tuhacro* **Corp.**, 529 U.S. 120, 133 (2000), *quoting Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995), and *FTC v. Mandel* **Brorhers. Inc.**. *359* U.S. 385, 389 (1959).

[54] *See, e.g., Alarm Industry Communications Committee v. FCC,* 131 F.3d 1066, 1068-69 (D.C. Cir. 1997) ("When the purponed 'plain meaning' of a statute's word or phrase happens to render the statute **senseless,** we are encountering ambiguity rather than clarity ")

[55] *See Petition for Rulemaking* io **Require** *Broadcast* **Licensees** *to Show Nondiscrimination in Their Employment Practices,* 13 F.C.C.Id 766 (1968).

[56] *See Petition for* **Rulemaking** *to* **Require** *Broadcast* **Licensees** *to Show* **Nondiscrimination** *in Their Employment Practices,* 18 F.C.C.7d 240 *(1969).*

area.[87] Thus. the arguments of the StBAs and LTVG that Congress could not have ratified the Cornmission's authorit? to adopt new or different EEO rules have no merit."

44. For the foregoing reasons. we find that Congress has granted us authority to regulate the EEO practices of hroadcast television and radio licensees. Whatever uncertainty may have existed 30 years ago concerning tlie Commission's public interest mandate and whether it is broad enough to authorize EEO regulation, it has now been resolved.

c. Other Authority.

45. We have relied in the past on our public interest mandates to foster diversity of programming and diversity of ownership as additional sources of statutory authority for broadcast EEO rules.'" We believe that the statutory authority discussed above is ample to support the adoption of broadcast EEO rules in this proceeding, and see no need for additional sources of statutory authority. Therefore. we decline to address the complex and elusive issues of whether there is a nexus between diversity in employment and diversity of programming or ownership and, if so. the extent of that nexus.

B. Broadcast and **MVPD EEO** Rules, Policies, and Forms

1. Anti-Discrimination Provisions

46. In tlie Second *NPRM* we proposed to retain the nondiscrimination provisions of our broadcast and MVPD EEO rules.'" **We** noted that the anti-discrimination provision of the broadcast EEO Rule[91] was not challenged in *Association*. Nonetheless, in rejecting the contention that the unlawful

[87] *See* cases discussed at notes 62. 78-81, ***supra.*** For example, in *Zemel v.* ***Rusk.*** 381 U.S. 1 (1965). the Supreme Coun held that the Secretary *of* State's imposition of new area restrictions on passports in 1961 was within its statutory authority under the Passpon Act of 1926 because Congress had ratified the Secretary's authority to impose such restrictions in 1952 by enacting passport legislation without tampering with the rulemaking authority granted to the Srcretary in the 1926 Act. The Secretary's exercise of that authority in 1961 to restrict travel to Cuba was deemed a proper exercise of its statutory authority even though no passports were required prior to 1961 – or **at** the time of Congressional ratification – for travel anywhere in the Western Hemisphere.

[88] The NAB asserts that the "outcome of [a continuous pattern of broad. meaningful] outreach, namely, a highly qualified. diverse workforce. causes the best possible product for radio and television stations . . ." NAB Comments at 68. While professing to support the adoption of EEO rules. at least if they conform to its proposal. the NAB nevertheless asserts that it "does not believe thar the Commission's authority to re-regulate in this area is indisputable." NAB Comments at 63. It is not clear why the NAB is advocating rules that it believes the Commission has questionable authority to adopt. In any event. it does not address the Commission's showing that Congress lias ratified the Commission's authority under the public interest standard to regulate the EEO practices of broadcasters Nor does it attempt to rationalize the bizarre .jurisdictional patchwork that would result if the Commission concluded that it has authority to regulate the EEO practices of cable operators and all othrr MVPDs under Section 634 of the Act - which is undisputed and indisputable - hut has no authority to regulate the EEO practices of broadcasters.

[89] *See, e.g.,* Repon and Order. ¶¶ 47-62. 15 FCC Rcd at 2346-2358.

[90] 16 FCC Rcd at 22849.

[91] Section 73.2080(a).

31. There is a substantial body of case law establishing the principle that congressional approval and ratification of administrative interpretations of statutory provisions. including those granting jurisdiction to regulate, can be inferred from congressional acquiescence in a long-standing agency policy or practice.[62] The inference of ratification from congressional acquiescence in the Cornmission's exercise of authority to adopt and enforce EEO regulations is particularly strong As noted above. the Commission lias consistently taken the position over a very long period of time -- 30 years -- that it lias authority under its public interest mandate to adopt and enforce EEO rules. and the obligations arising under those rules have become a major component o f broadcasters' obligation to serve tlie public interest.': Moreover, as noted above, the Commission has enforced its regulations vigorously. These are not obscure agency rules that could have gone unnoticed by Congress.

32. But congressional ratification of the Commission's authority to adopt EEO rules need not be inferred solely from congressional acquiescence in the Commission's exercise of that authorit), over a period of many years. Congress has, in *two* major pieces o f legislation, *expressly* approved and ratified the Commission's authority to regulate the EEO practices of its broadcast licensees and other media entities as well.

33 In 1984. Congress enacted Section 634 of the Communications Act[64] as part of the Cable Communications Policy Act of 1984.[65] Although the Commission at that time already had rules in place regulating tlie EEO practices of cable operators as well as broadcasters, Section 634 was intended to "codif[y] and strengthen[] the Commission's existing equal employment opportunity regulations."[66] Section 634 granted the Cornmission broad authority to adopt rules banning employment discrimination by cable operators and requiring cable operators to "establish, maintain. and execute a positive

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[62] ***See,*** e g., *Haig* i. *Agee,* **453** U.S. *280,* 300-06 **(1981)** ("*Haig*") (long-standing interpretation by the Secretary of Stale of its power under Passport Act of 1926 as encompassing the power to revoke passports to prevent damage to national security or foreign policy was ratified by congressional acquiescence, even though Secretary exercised power infrequently). ***Lorillard*** *v* ***Pons.*** 434 U.S. *575,* 580-85 (1978) ("*Lorillard*") (Congress is presumed to he aware of administrative and judicial interpretations of a statute and to adopt and ratify those interpretations when it re-enacts a stature without chanpe or incorporates in a new law sections **of** a prior law that have a settled interpretation); *Zemel v* ***Rush,*** 381 U.S. I. 9-13 (1965) ("*Zemel*") (Secretary of State's interpretation o f Passport Act of 1926 as authorizing him *to* impose area restrictions was rarified by Congress when it lefi untouched the Secretary's broad rulemaking authority when it later enacted legislation relating to passports); Norwegian *Nitrogen* ***Products*** *Co v U.S.*, 288 U.S. 294. 313-15 (1933) ("administrative practice, consistent and generally unchallenged. will not be overturned except for very cogent reasons if the scope ofthe command is indefinite and doubtful").

[hi] *See, e.g., 1969 Report and* ***Order.*** 18 F.C.C. 2d at 241-42; *1976 Report* ***und Order.*** 60 F.C.C. *2d* at 229; *Report,* 9 F C.C. Rcd at 6285-87.

[64] 47 U.S.C. § 554.

[65] Pub. L. No. 98-549, 98 Stat. **2779** ("1984 Cable Act")

[66] H.R. Kep. No. 934. 98th Cong., 2d Sess. 86 (1984), ***reprinted in*** [1984] U.S. Cong. News 4655. The Senate hill that was ultimately enacted, S. 66. did not contain EEO provisions. The EEO provisions that were eventually enacted as Section 634 originated in Section 635 of H.R. 4103, which is explained in H.R. Repon No. 934. discussed below The Senate adopted the explanation of H.R. 4103 contained in H.R. Report No. 934. *See* 130 **C.R.** S.14285 (Oct. 11. 1985), ***reprinted in*** [1984] U.S.Cong. News 4738.

we will depart from our general policy in every instance in which multiple allegations or alleged discriminatory practices are present.

49. We will also retain the proviso in our broadcast anti-discrimination rule that religious radio broadcasters may establish religious belief or affiliation as a job qualification for all station employers. We will also continue our policy of applying the same proviso to television broadcast licensee?

50. The Rule adopted by the *Report and Order* defined a "religious broadcaster'. as "a licensee which is. or is closely affiliated with. a church, synagogue, or other religious entity, including a subsidiary of such an entity."[98] In the ***Reporr and Order,*** we clarified that, in the event of a controversy. we would determine on a case-by-case basis whether a licensee was a religious broadcaster by considering such factors as whether it operates on a non-profit basis. whether it has a distinct religious history, whether tlie entity's articles of incorporation set forth a religious purpose, and whether it carried religious programming." Thus. an entity could, based on the totality of the circumstances, qualify as a "religious broadcaster'. even if it operated as a for-profit entity or lacked an extensive religious history. National Religious Broadcasters ("NRB") urges that we should clarify the definition by indicating that a for-profit broadcaster would qualify as "religious" if at least SO percent of its airtime was devoted to religious programming and it has either organizational documents reflecting a religious purpose or a distinct religious history'"" Lutheran Church — Missouri ***Synod*** ("Lutheran Church") urges that the interjection of a requirement for a specific percent of religious programming is unnecessary and could create confusion as to the definition of religious programming."' We find **no** need to revisit this matter."" We have encountered few problems concerning the definition of a religious broadcaster since **we** initiated this policy. Further, the adoption of a test based on a prescribed percentage *of* "religious programming" could create unnecessary difficulties in determining whetlier particular programming is "religious."

51. Two commenters, Doreen Vincent and John Bronikowski, lhave urged us to extend the scope of tlie anti-discrimination rules to encompass discrimination based on physical disabilities. In the *Report and* ***Order.*** we noted that both Congress and the Commission have taken steps to ensure that persons with disabilities share in the benefits of modern communications services and products. We also noted that the broad outreach requirements of the EEO rules being adopted would benefit all potential job applicants. including those with disabilities, in obtaining information about broadcast employment opportunities. We nonetheless found the proposals beyond the scope of the proceeding."" We still

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97 As dircussed above, because the nondiscrimination requirement was not invalidated by the court, we must continue to enforce it against television broadcasters under Section 334.

98 47 C.F.R. § 73.2080(a).

99 *Report and Order*, ¶157-161, 15 FCC Rcd at 2392-93.

100 NRB Comments *at* 4. NRB correcily notes thar our reference to "articles of incorporation" in the *Report and Order* was intended to refer to any valid organizational documents of an entity, not just to a document entitled "articles o t incorporation."

101 Lutheran Church Reply Comments ai 3.

102 *Report and Order*, ¶ 157-161, 15 FCC Rcd at 2392-93.

103 *Report and Order*, ¶ 74. 15 FCC Rcd at 2362-63.

requirements and proclaimed that vigorous enforcement of those rules served the public interest. Congress made the following findings in Section 22(a) of the 1992 Cable Act:

> (1) *despite the* ***existence of regulations governing equal employment*** *opportunity*, females and minorities are not employed in significant numbers in positions of management authority in the *cable* ***and broadcast television indusrries;***
>
> (2) increased numbers of females and minorities in positions of management authority in the *cable and* ***broadcast*** *television* ***industries*** advances the Nation's policy favoring diversity in the expression of views in the electronic media: and
>
> (3) rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination."

By extending the cable EEO requirements to every entity that provides multiple channels of video programming. such **as** MMDS operators and DBS licensees, Congress was building upon and closing the gaps in the Commission's regulatory scheme. ensuring that ***every*** electronic mass media provider would he subject to EEO regulations enforced by the Commission.

37. **As** noted above. the 1992 Cable Act not only strengthened and extended the cable EEO requirements. it also codified the Commission's EEO requirements for broadcast television stations in Section 334 of the Act." Section 334 thus explicitly recognizes the existence of the Commission's broadcast EEO Rule and requires the Commission to keep its EEO requirements in effect for television broadcasters.[75]

38. Furthermore. Section 22(g) of the 1992 Cable Act required the Coinmission to report to Congress within two years on "the effectiveness of [the Commission's] procedures. regulations. policies. standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women and minorities in positions of management authority." The Commission was required to include in that report "such legislative recommendations to improve equal employment opportunity in the *broadcasting* ***und cable*** *industries* as it deems necessary."[76] Congress would not have directed the Commission to review the effectiveness of its broadcast and cable EEO policies and regulations then in effect. and recommend whether further legislative action was necessary. had Con,gress not believed that those policies and regulations were within the Commission's lawful authority." Thus. Section 22(g) is further evidence of Congress' affirmative approval of the Commission's authority to adopt equal employment opportunity requirements for broadcasters.[78]

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[73] 1992 Cable Act. Section 22(a) (emphasis added). ***See also*** H.R. Rep. No. 628. 102d Cong., 2d Sess 1 11-17 (1992)

[74] 47 U.S.C. § 334. ***See*** *also* Conf, Rep. No. 862, 102d, 2d Sess. 97 (1992)

[75] **As** discussed above. to the extent that the court in ***Lutheran Church*** invalidated *the* 1992 EEO rules. the Commission cannot cnntinue to enforce them. But Section 334 does require that the Commission continue to entorce against television broadcasters the nondiscrimination requirement, which was nor invalidated.

[76] 1992 Cable Act, Section 22(g) [emphasis added!:

[77] We note that the Commission's EEO rules for broadcasters apply to radio as well as television stations

[78] *See, e.g. Bob Jones University v United States*, **461** U.S. 574 (1983) ("*Bob Jones University*").

56. StBAs further contends that we can rely on the broadcast industry to engage in active recruitment without an EEO Rule because broadcasters have a "strong, inherent incentive" to attract a robust stream of qualified men and women of all racial and ethnic backgrounds.[107] StBAs contends that there is no need for an EEO Rule to deter discrimination or to curtail discriminatory effects from reliance on word-of-mouth recruitment methods. It further contends that there *is* no evidence that the broadcast industry as a whole engages in discrimination or that specific recruiting practices are needed as a remedy for discrimination, **StBAs** also suggests that any regulation designed to deter discrimination must he limited to intentional discrimination because constitutional prohibitions against discrimination as well as Title VII of the Civil Rights Act of 1964 are limited **to** intentional discrimination!"[108]

57. First. our concern is not limited to intentional discrimination. Thus, it is not based on Constitutional provisions or on Title VII, but on the public interest standard in the Communications Act. In adopting tlie Cable Television Consumer Protection and Competition Act of *1992* ("Cable Act"). Congress expressly found in pertinent part: "rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination."[109] Congress lias made it clear that the public interest standard is sufficiently hroad to cover not only intentional discrimination. hut also discrimination that may arise as a result of practices and policies that are not intentionally discriminatory. Further, our policy is not limited to imposing sanctions in response to specific **past** discrimination; it is also intended to deter discrimination in the first instance. Thus, our policy is designed to prevent both intentional and unintentional discriminatory practices in tlie broadcast and MVPD industries. and to ensure equal opportunity in employment practices, including recruitment.

58. Second, it is not necessary to find that the broadcast industry "as a whole" has engaged in discrimination in order to justify regulations to prevent discrimination. We do inot suspect that the entire broadcast industry. or even most of it, engages in intentional or unintentional discrimination.[110] Nonetheless. discrimination is so fundamentally inconsistent with the public interest that rules are justified to deter even the possibility of discrimination. Thus, the requirements we are adopting today are not. as characterized by **StBAs,** "essentially remedial."[111] They are designed to prevent discrimination. not **to** provide a remedy after it occurs.

59. Third. although we commend the broadcast associations for the various activities detailed in their comments. they do not demonstrate that an EEO rule is unnecessary. In the period since *Lutheran Church*. we have continuously held out the possibility that we would adopt new rules designed to remedy the problems identified hy the court, Indeed. for approximately nine months – from April

[107] StBAs Comments at 12.

[108] StBAs Comments at 3 1-34

[109] 1992 Cable **Act.** Section 22(a)

[110] MMTC submined a study long after the comment period closed in this proceeding that purports to show intentional discrimination *in* the broadcast and MVPD indusrries based upon lower than average minority employment rates. *See ex parte* lener dared October I, 2002, from MMTC to FCC. Exhibit I ("The Reality *of* Intentional Job Discrimination in Metropolitan America – 1999" by Alfred W. Blumrosen and Ruth G. Blumrosen). Given that we have nor thoroughly analyzed rhis study nor received comment on it, we **do** not rely on its findings to support adoption of new EEO rules. At any rate. we are not convinced that deviations below the average employment rate can be equated with intentional discrimination.

[111] StBAs Comments at 34

cable operators. and all other MVPDs. including such relative newcomers as DBS and MMDS operators.[84] Thus. rejecting the inference of congressional ratification would leave us in the anomalous situation of having jurisdiction to regulate the EEO practices of broadcast television and MVPDs. but *not* radio broadcasters. There is no indication in the legislative history that this was Congress' intent and none of the broadcasters commenting in this proceeding even attempts to explain why Congress would have intended such a result.

41. Two parties do, however, challenge the Commission's contention that Congress has ratified the Commission-s authority to regulate the EEO practices of broadcasters. StBAs asserts that "an)' claim that Congress has ratified this new rationale is unsupportable in light of Congressional silence on the matter since the Court of Appeals decisions in *Lutheran Church* and *Broadcasters*," adding that "Congress could have created a statutory program or mandated a new regulatory approach in this area – but did not."[85] Similarly. LTVG argues that "Congress cannot possibly have 'ratified' by its past inaction a set of 'outreach' rules that. according to the FCC, represents a radical departure from the FCC's entire past history and practice with respect to broadcast EEO regulation."[86]

42. These comments reflect a fundamental misunderstanding of the nature and effect of Congressional ratification *of* our statutory authority. **As** explained above, the Commission since 1969 has interpreted the Communications Act's grant of authority to license and regulate broadcasters as the public interest. convenience and necessity require as authorizing the Commission to regulate the equal employment practices of broadcasters. Specifically, it has interpreted the statute as granting it authorit? to prohibit broadcast stations from engaging in employment discrimination and to require them to maintain programs designed to ensure equal opportunity in all aspects of station employment. including recruitment. It is that interpretation *of* the *scope of the* ***Commission****'s statutory authority* ***under*** *the Communications Act* that Congress has ratified over the course of many years.

43. Once Congress ratified the Commission's interpretation of the scope of its statutory authority. **as** it clearly had by 1984. the Commission could exercise that authority by adopting new EEO rules to replace those held unconstitutional by the D.C. Circuit. Thus, Congress's later "silence" after the *Lutheran Church* and *Broadcasters* decisions is immaterial, And the fact that Congress did not act to 'mandate" a new EEO regulatory regime is equally immaterial. Having already made it abundantly clear that the Communications Act authorized the Commission to regulate the EEO practices of broadcasters. there was no need for Congress either to mandate or once again to authorize Commission action in this

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[84] 47 U.S.C. §§ 334, 554.

[85] StBAs Comments at 31

[86] LTVG Comments at 31

conclude that the issue is beyond the scope of the proceeding. We do not have a sufficient record to determine the feasibility of providing further relief within the context of our EEO rule.

2. Broadcast EEO Prorrarn Reauirements

a. Rules and Policies

i. General Considerations

52. Several broadcast commenters have challenged the basis for our adopting any EEO Rule for broadcasters. Initially, they seek to characterize our proposals in the *Second NPRM* as constituting "re- regulation."[104] In fact, we have never "de-regulated" in this area; the court decisions that have invalidated various aspects of our EEO rules have been premised on specific legal defects found in our programs. not on a finding that nondiscrimination rules or outreach requirements are unnecessary.

53 NAB and StBAs stress that the broadcast industry has demonstrated its commitment to EEO, especially in the period since our Rule was invalidated in ***Lutheran Church.*** They argue that the industry has made meaningful EEO efforts even in the absence of a rule requiring them to do ***so*** and. therefore. that rhere is no need for an EEO Rule.[105]

54. NAB cites the creation more than ***25*** years ago of the NAB Career Center. which has undertaken a number of activities designed to foster nondiscrimination and diversity. including conducting a job fair in cooperation with the Broadcast Education Association during the annual NAB convention KAB also cites its maintenance of an Internet web site that serves as a clearinghouse for information concerningjob openings at member stations. Furthermore, the NAB Educational Foundation ("NABEF") operates various programs to provide education, experience and training for employment in the broadcast industry. NABEF also makes contributions to organizations that support minority interns and training. NAB provides fellowships for professional managers. including minorities and women, to attend its management development programs and its Broadcast Leadership Training Program. NAB also notes that state associations conduct job fairs and maintain job web sites. NAB argues that these efforts have continued even in the absence of federal regulations and contends that they will continue irrespective of the outcome of this proceeding.[106]

55. StBAs points to the creation of Internet job web sites by the National Alliance of State Broadcasters Associations ("NASBA"). and the state broadcast associations themselves, which continue to function notwithstanding the absence of an EEO rule. It further indicates that 29 state broadcast associations sponsor. co-sponsor. or significantly participate in job fairs. StBAs also notes that state associations support internship programs by providing stipends for student interns or directly sponsoring intern programs. and that five associations have provided significant support for mentoring programs. Nearly two-thirds of the state associations provide fellowships and scholarships. Also. associations in several states liave created partnerships with local organizations in implementing various programs designed to promote outreach.

[104] *See. e g.,* StBAs Comments at 7

StBAs Comments at 32.

[106] NAB Comments at 4-10.

Option B could be severed from the EEO rule, the court stated that the "entire rule" must he vacated. [92] In order to avoid any confusion arising from the language in the court's decision. we recodify the nondiscrimination requirement. Nondiscrimination is an essential component of every licensee's obligation as a trustee of a valuable public resource. Moreover, a finding that a broadcaster has engaged in employment discrimination would raise a serious question as to its character qualifications to he a Commission licensee. In *Bilingual Bicultural Coalition on Muss Media, Inc. v. FCC*,[93] the court stated that "[a] documented pattern of intentional discrimination would put seriously into question a licensee's character qualifications to remain a licensee: intentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship."[94] Finally. we are required by statute to prohibit discrimination by broadcast television licensees and MVPDs.[95]

47. As proposed in the *Second NPRM*, we will retain our policy of generally deferring action on individual complaints of employment discrimination against broadcasters and MVPDs pending final action by the Equal Employment Opportunity Commission ("EEOC") or other government agencies and/or courts estahlished to enforce nondiscrimination laws. We will also retain the discretion to take action. notwithstandinp the absence of a final decision by the EEOC or other agency/court, where the facts of a particular case so warrant. As indicated in the ***Report and Order,*** our policy generally reflects the fact that Congress intended the EEOC to be primarily responsible for the resolution of discrimination complaints and our separate adjudication of such complaints could result in duplicative or inconsistent decisions.

48. Named State Broadcasters Associations urge that we should defer entirely to the EEOC or other appropriate agencies or courts concerning discrimination. StBas construes the ***Second*** *NPRM* as reflecting a proposal that only individual complaints would be deferred and that we would directly consider complaints alleging discriminatory patterns and practices.[96] This is incorrect. We do not intend to exercise our discretion routinely to consider allegations of discrimination before an EEOC or court decision has been made. This will be true whether the complaints allege a single instance or multiple instances of discrimination or discriminatory patterns and practices. In the ***Reporr*** *and* ***Order.*** we indicated that any exceptions to our general policy would he decided on a case-by-case basis. We cited as examples that we might consider alleged discrimination prior to a final EEOC or court ruling. under certain circumstances. if there are well-supported allegations of discrimination made by a large number of individuals against one broadcast station or MVPD unit. or well-supported allegations of discrimination that shock the conscience or are particularly egregious. This does not, however. mean that

[92] 236 F.3d at 23. In its rehearing petition. the Commission interpreted the court's decision as vacaring only those subsections of the EEO rule involving the Option A and B EEO program requirements. *i.e.*, 47 C.F.R. § 73.2080(c), (d) and *(e)*,as well as those portions ofsubsections (f), **(g),** and (i) that cross-reference those provisions. Commission Petition for Rehearing and Suggestion for Rehearing En Banc. filed March 2, 2001. at 10 n.1. The court did nor address this interpretation in its rehearing order, and no commenter has suggested that the court intended to invalidate the nondiscrimination requirement.

[93] ***595*** F.2d 621 (D.C. Cir. **1978).**

[94] *Id.* at 629.

[95] 47 U.S.C. §§ 334 and **554.** *See* ¶¶ 19-20, 26. *supra.* Section 554(b) also prohibits MPVDs from discriminating on rhe basis of age

[96] StBAs Comments at 35-39.